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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1943.

Nos. 429 and 430

FOREMAN M. LEBOLD AND SAMUEL N. LEBOLD,
Petitioners,

vs.

INLAND STEEL COMPANY, A CORPORATION,
Respondent.

ANSWER OF PETITIONERS, FOREMAN M. LEBOLD AND SAMUEL N. LEBOLD, TO BRIEF OF INLAND STEEL COMPANY, RESPONDENT, IN OPPOSITION TO THEIR PETITION FOR A WRIT OF CERTIORARI.

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TABLE OF CASES.

	PAGE
Baillie v. Columbia Coal Mining Co., 166 Pac. (Ore.) 954	5
Berle & Means, "The Modern Corporation and Private Property"	5
Ervin v. Oregon Ry. & Nav. Co., 27 Fed. 625	5
Farmers Loan & Trust Company v. N. Y. & Northern R. R. Co., 150 N. Y. 410, 44 N. E. 1043	5
Heiner v. Crosby, 24 F. (2d) 191	3
Hyams v. Calumet & Hecla Mining Co., 221 Fed. 529 (C. C. A. 6th)	5
In re Doe Run Lead Co., 223 S. W. (Mo.), 600	5
Jones v. Missouri-Edison Electric Co., 144 Fed. 765 (C. C. A. 8th)	5
Kavanaugh v. Kavanaugh Co., 123 N. E. (N. Y.), 148	5
Lebold v. Inland Steamship Company, 82 F. (2d) 351	2
Major v. American Malt Co., 181 N. Y. S. 152	5
Marks v. Merrill Paper Co., 188 Fed. 850	5
Moore v. Lewisburg, etc. Co., 93 S. E. (W. Va.), 762	5
Morse v. Metropolitan, etc. Co., 100 Atl. (N. J. Eq.), 219	5
Pepper v. Litton, 308 U. S. 295	5
Southern Pacific Company v. Bogert, 250 U. S. 483	5
Wheeler v. Abilene Nat. Bank Bldg. Co., 159 Fed. 391 (C. C. A. 8th)	5

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondent's brief in opposition does not question that the petition seeks review (a) of an important question of federal law which has not been but should be passed upon by this court, (b) that the decision below is in conflict with the decisions of other circuits, (c) probably in conflict with applicable decisions of this court, and (d) that the court below has so far departed from the accepted and usual course of judicial proceeding as to call for an exercise of this court's power of supervision. Respondent's "confession and avoidance" therefore leaves the question of issuance of the writ where it always is: in the sound discretion of this court; but without contest as to the existence of grounds.

I.

Some answer should be made, however, to respondent's erroneous assertion (unsupported by record references) that petitioners, in challenging the action of the court below as improper under Rule 52(a), are changing the position taken by them before that court on both appeals. It should be obvious that we do not urge that a Circuit Court of Appeals is powerless to set aside findings made by the trial court. The rule clearly contemplates that this may be done. Our contention here is that the court below improperly exercised such power.

It is true that on the first appeal we attacked what respondent's brief (p. 4) refers to as the "finding of fact" that "when the Steamship Company was dissolved 'the value of its stock amounted to nothing more than the value of a distributive share of the physical assets of the company' ".[1] But this was because on the first appeal the question was whether petitioners' stock was to be valued as stock in a going concern continuing in business, or as stock in a defunct company having only liquidating value. There were no *fact* issues. The question was purely a question of law, the answer to which, we thought and the court below agreed, was accurately forecast by its decision of March 18, 1936 in the first suit instituted by these petitioners (*Lebold* v. *Inland Steamship Company*, 82 F. (2d) 351).

On the second appeal in this case petitioners, by cross appeal, raised the question (which without cross appeal would not have been open) whether the trial court had

1. It seems to us that the complete finding reflects a meaning different from that resulting from respondent's partial quotation. It reads as follows:

"Upon the announcement that Steamship Company would be dissolved and upon the completion of the dissolution of the company, the value of its stock amounted to nothing more than the value of a distributive share of the physical assets of the company" (O. R. 226).

properly carried out the mandate of the Circuit Court of Appeals. Before that court we said:

> "Our contention that it did not do so is not predicated on the proposition that there is no substantial evidence to support the findings of the trial court, because obviously the evidence more than supports the finding of valuation made by the court. Our position is that in arriving at its conclusion, the trial court relied in part upon evidence which does not meet the standards laid down by this court. In so doing, the trial court reached a valuation which is lower than that required by the evidence that is in accord with the criteria." (Reply brief, p. 36.)

We agree that the question of what criteria should be employed to determine value is a question of law, and it was upon this basis only that we challenged the trial court's finding of value. We cannot, however, agree that the trial court's finding of a value of $2,350 a share was not one of fact. It is fair to note that respondent's proposed findings and conclusions submitted to the trial court after the valuation hearing included a finding of "fair value" as a finding of fact, not as a conclusion of law (R. 137). "The fair market price or value of stock at a particular time is a question of fact. * * *" (*Heiner* v. *Crosby,* 3 Cir., 24 F. (2d) 191, 193.)

II.

Respondent says (p. 4) that the issue of the measure of damages was not before the court on the first appeal. This is erroneous. The issue then before the court was whether or not respondent was liable to petitioners for the value of their stock considered as stock in a going concern. The determination of that question, predicated on the conclusion that respondent had taken something in violation of its fiduciary obligation, necessarily included also the determination that respondent, as such fiduciary,

was liable to these petitioners for the value of what it had taken. Respondent recognized this by introducing evidence of value (O. R. 60, 67). On the first trial a witness for respondent had testified on cross-examination that the stock of the Steamship Company would be worth $2500 a share if its business continued (O. R. 93). Respondent submitted findings on the question of value (O. R. 226, 227); it was the subject of assignment of error(O. R. 233, 234), and it was argued in briefs.

III.

It is stated (Br. p. 5), with respect to the arrangement between the two companies, that this was an arrangement "which the stipulation between the parties said was not contractual and therefore did not have to be continued at all". Petitioners stipulated only that there was no contractual arrangement between the Steel Company and the Steamship Company with respect to the carriage of traffic. Petitioners made *no* stipulation that the arrangement between the two companies "did not have to be continued at all."

IV.

Respondent adopts (Br. p. 11) the fourth reason urged by us for granting the writ, namely, that the court below has so far departed from the accepted and usual course of judicial proceeding as to call for an exercise of this court's power of supervision. Respondent argues, however, that this is no reason for granting the writ on our petition but only for granting the writ on respondent's petition. Respondent's contention requires it to characterize as an "irregularity" what is not at all within the rule—the alleged disregard by the court below of the stipulation that there was no contractual arrangement between the Steel Company and the Steamship Company.

Thus, respondent—although nowhere meeting the issue that it was a trustee for these petitioners as minority stockholders—argues again that it did not breach its obligation as a trustee because it did not breach a non-existent contract. It is obvious, however, that existence or non-existence of such a contract is utterly immaterial to the question whether respondent was or was not a trustee. The conclusion of the court below that respondent stood in a fiduciary relation to petitioners is sustained by the overwhelming weight of authority.[2]

V.

Respondent (Br. p. 13) disagrees with our statement (Pet. p. 16) that computations of hypothetical earnings on the assumption that the Steamship Company was a competitive contract carrier were introduced "in violation of respondent's stipulation not to introduce evidence contrary to stipulated facts (R. 190)."

Our criticism was intended to apply only to those computations relating to that particular hypothesis, namely, Defendant's Exhibits D-2, D-3 and D-9 (R. 117, 120, 126). It was always our understanding that these particular computations admittedly contradicted the stipulated facts. Respondent's counsel in his opening statement in the trial court (not in the record) referred to the then prospective testimony of Mr. Badger as follows: "On the basis of an

2. *Pepper* v. *Litton*, 308 U. S. 295, 306; *Southern Pacific Company* v. *Bogert*, 250 U. S. 483, 487, 491; *Jones* v. *Missouri-Edison Electric Co.*, 144 Fed. 765, 771 (C. C. A. 8th); *Wheeler* v. *Abilene Nat. Bank Bldg. Co.*, 159 Fed. 391, 393, 394 (C. C. A. 8th); *Ervin* v. *Oregon Ry. & Nav. Co.*, 27 Fed. 625, 630-632; *Marks* v. *Merrill Paper Co.*, 188 Fed. 850, 854, 855; *In re Doe Run Lead Co.*, 223 S. W. (Mo.) 600, 609, 610; *Morse* v. *Metropolitan etc. Co.*, 100 Atl. (N. J. Eq.), 219, 221 (affirmed at 102 Atl. 524); *Baillie* v. *Columbia Coal Mining Co.*, 166 Pac. (Ore.) 954, 974; *Moore* v. *Lewisburg, etc. Co.*, 93 S. E. (W. Va.) 762, 765; *Major* v. *American Malt Co.*, 181 N. Y. S. 152, 153; *Kavanaugh* v. *Kavanaugh Co.*, 123 N. E. (N. Y.) 148, 151; *Hyams* v. *Calumet & Hecla Mining Co.*, 221 Fed. 529, 543 (C. C. A. 6th); *Farmers Loan & Trust Company* v. *N. Y. & Northern R. R. Co.*, 150 N. Y. 410, 44 N. E. 1043. See also Berle & Means, "The Modern Corporation and Private Property" (page 251).

assumption that Inland Steamship Company, upon entering the competitive field, could have done likewise and earned the same return, it is an easy matter to determine a value per share, and that value will be in excess of the number of dollars per share which the plaintiff received on liquidation. But the conclusion of the witness will be squarely contrary to the stipulation entered into by plaintiff and defendant."

This statement, of course, referred only to the expert's conclusion, but we have never supposed there was any real distinction between such a conclusion and the computations on which it was based. In that possible distinction, however, lies the only room for disagreement.

VI.

This court will not be misled by respondent's attempted reflection on petitioners' motives. Let us look at the record. The dissolution was adopted for the sole *purpose* of eliminating petitioners as minority stockholders (O. R. 82). The sole *reason* for adopting it was petitioners' refusal to sell the stock to the majority at the price fixed by the majority—a price expressly held by the court below in the first case to be less than fair (82 Fed. (2d) 351, 356). The sole objective and the sole accomplishment were to eliminate petitioners from participation in the common enterprise.

Prior to the dissolution a vice president both of respondent and of the Steamship Company said, with respect to the dividends paid the latter's stockholders: "I have got my eye on the part that we do not get" (O. R. 100); that "it gripes me very much * * * to pour a golden stream to the minority stockholders" (O. R. 99). After the dissolution he said that "the principal economy in direct operation comes from operating at cost without a profit * * * to the extent that we did not own the stock, the profit did not

flow to us. It was *this* profit that did not flow to us that was *the major item of added cost''* (O. R. 58; italics supplied).

And it is fair to point out here that the actions complained of by petitioners were forced by respondent in the face of the following statement in the decision of the court below in the first case (March 18, 1936):

> ''We would be more favorably impressed by the protestations of good faith of appellee's officers had they in their capacity of representatives of the dominant company shown a willingness to submit to arbitration the value of appellants' minority stock. The majority stockholder may believe that it is entirely fair, but its position renders impartiality difficult, for it is compelled to say, 'Let not thy right hand know what thy left hand doth.' In view of the frankly admitted desire of the majority to acquire the stock of the minority, its frank confession that the payments of profits to the minority brings only chagrin and dissatisfaction to the majority, the threat that, unless the minority will sell to it at its own price, it will force dissolution and liquidation of assets and thus produce an opportunity to purchase at a satisfactorily low market price all the physical assets, we confess to some doubt as to eventual results. That degree of fairness required of parties in a dominant situation, or of fiduciary representatives of corporations, or of majority stockholders to the minority, making legal duress impossible, must be present before a court of equity may rest quiescent.'' (82 F. (2d) 351, 355.)

It is respectfully submitted that the writ prayed for by these petitioners should issue and provide for review of the questions presented in the petition herein.

Respectfully submitted,

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Franklin M. Warden,
Arthur D. Welton, Jr.